# APPENDIX A

## UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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| JULES GARRISON, *Appellant,* | ) | |
| vs. | ) | No. 14,316 |
| WARNER BROTHERS PICTURES, INC., a corporation, *Appellee.* | ) | Oct.3,1955 |

Appeal from the United States District Court for the Southern District of California, Central Division.

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Before STEPHENS and FEE, Circuit Judges, and WIIG, District Judge.

Wiig, District Judge:

Garrison appeals from an adverse judgment in his action for breach of contract against Warner Brothers Pictures, Inc., a corporation. Trial was had before the district court, sitting without a jury, and judgment was entered based upon the court's findings of fact and conclusions of law.

The breach of contract was predicated on offers made by Warner Brothers, through the media of a newsreel and newspaper stories, that it would pay $1,000,000 to anyone who could prove that actor Burt Lancaster, the star of a motion picture entitled "The Flame and the Arrow," did not perform all the dar-

ing stunts he was shown doing in the motion picture. Garrison saw the newsreel and the motion picture. He then had two telephone conversations with an attorney for the corporation. In the first conversation he told the attorney he "felt sure," "thought," or "believed" he could prove that Lancaster had not done all of the stunts in the picture. Three days later, Garrison told the attorney he could prove his claim. (No effort, however, was made to prove it until the trial of the action, about three years later.) Garrison, a resident of Los Angeles, California, also told the attorney that if he would "arrange for Warner Brothers to buy me a ticket to New York and a suit of clothes and some change to put in my pocket I will go to New York" and "forget about it." The attorney told Garrison it was his position that no offer had been made but that if Garrison thought one had been made it was withdrawn. Later, Garrison, through his own attorney, wrote Warner Brothers that Garrison had accepted the offer and had given proof that Lancaster "did not do all of the stunts he is shown doing in the picture."

The illusory offer apparently confounded Garrison's trial attorney. The complaint alleged, among other things, that Warner Brothers offered to pay the sum of money to anyone who could prove Lancaster "did not do or perform all of the stunts he was shown doing *or purported to perform*" in the motion picture. (Emphasis supplied.) A careful examination of the record fails to reveal any evidence in support of the

making of an offer in the words or language alleged in the complaint. The trial court's finding that no offer as set forth in the complaint was ever made was clearly correct.

If a bona fide offer is made and is accepted within a reasonable time without conditions and without varying its terms, a contract may arise. There can be no contract if the offer is revoked before a valid acceptance. The evidence showed that Garrison never performed acts which would have constituted an unqualified acceptance of the alleged offer. At the most, he indicated only that he thought he could prove Lancaster did not do all the daring stunts shown in the motion picture.

Garrison urges that the attempt to revoke the offer by direct communication with him was ineffectual because the revocation must have been made by the same means as used in making the offer—newsreels and newspapers. This unique contention is not supported by any authority or reason. As to the remaining members of the public, the same media would have to be used in order to revoke the offer, but as to Garrison, direct personal notice that it had been withdrawn was sufficient.

In connection with the issue as to whether Lancaster performed all his daring stunts in the motion picture, Garrison proved that in three episodes a substitute actor appeared in the film portraying the character played by Lancaster. By the use of trick photography in a scene wherein this character was shown

carrying a young boy along the crest of a roof, it would appear to a viewing audience that the action was daring or dangerous. However, in the motion picture set, a platform two feet wide was erected behind the false front of the building. Approximately four feet below that platform, there was another platform three feet wide protected by a hand rail three and a half feet high. None of this, of course, was shown in the film, but it was along the upper platform that the actor actually ran carrying the youth. In the second episode, the substitute actor entered a courtyard on horseback, came to a stop, stepped down to the bed of a stationary two-wheel cart, cut a rope by which another character was suspended, and then drove the horse pulling the cart away from the courtyard. In a sword fight or duel, two short views showed the arm and shoulder of the substitute actor. To the audience, the action portrayed actual combat. This illustion was dispelled by testimony of a fencing instructor, who described himself as a "motion picture choreographer of fencing," to the effect that all the action was laid out and memorized and practiced in advance in the same manner as the choreography of a ballet. The trial court found that the foregoing did not constitute stunts. We have viewed the film and examined the record, and affirm the trial court's finding in this respect.

Garrison urges that the picture itself defined the term "stunt" and what is daring or dangerous through its representation to the public that what the public saw on the screen was real. Warner Brothers answers

by saying: "This disregards entirely the fact that any motion picture in its entirety is an illusion," and adds that: ". . . what constitutes a 'daring stunt' cannot be tested by the apparent danger created through the ordinary practices of the dramatic acts." We accept the answer.

Before trial, Garrison filed a request for admissions pursuant to Rule 36, Federal Rules of Civil Procedure. Warner Brothers, in its answer filed ten days later, denied one of the requests, the denial being based on the information furnished counsel for the corporation at that time. A year and a half before trial, more information was developed during the taking of Lancaster's deposition, and it was learned that the denial of the admission was in error. Garrison's attorney was then apprised of the truth as to this portion of the testimony which he proposed to offer during the trial.

In an affidavit in opposition to Garrison's motion for an order requiring payment of attorney's fees and costs pursuant to Rule 37(c), Federal Rules of Civil Procedure, Warner Brothers' counsel admitted the error but set forth facts showing that an honest and concerted effort had been made prior to filing the answer to secure all available information concerning the request, and that the denial was made in the belief that it was accurate. Under the circumstances, the trial court did not err in denying the motion for attorney's fees and costs.

(Endorsed:) Opinion. Filed Oct. 3, 1955.
Paul P. O'Brien, Clerk.

# APPENDIX B

## $500,000 FOR TIP ON ALIEN BOMB VOTED

### House Passes Bill Setting Rewards for Spotting Sabotage

WASHINGTON, July 5 (AP)—The House voted unanimously today to pay a reward of up to $500,000 to anyone who uncovers an effort to smuggle atomic bombs or nuclear material into the United States.

The measure, which now goes to the Senate for action, was aimed at protecting the nation against sneak atomic attack. Officials have warned that a single saboteur armed with a "suitcase" A-bomb could cause untold damage.

*Prior to Attack*

The Joint Congressional Atomic Energy Committee, which recommended the reward, said it is possible for a saboteur to "smuggle nuclear devices or special nuclear materials into this country" and "destroy vital targets" prior to an enemy attack.

"It must be assumed that potential enemies can now devise small atomic weapons, so constructed as to minimize the chance of detection by customs, by counter-intelligence or defense personnel," the group said.

The committee noted that the measure was backed by the Justice Department, the Atomic Energy Commission and the Central Intelligence Agency, the nation's top-secret espionage agency.

*Alert Year Ago*

The FBI more than a year ago alerted police officials across the nation to watch out for "bombs or parts of bombs which might be smuggled into the United States."

Under the House-approved bill, cash rewards to individuals uncovering such an attempt could range up to $500,000. The President would have to approve any reward of more than $50,000.

In addition, the legislation would grant permanent sanctuary in this country to any alien who tips off this country to atomic smuggling efforts.

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IN THE

# Supreme Court of the United States

October Term, 1955

No. 615.

JULES GARRISON,

*Petitioner,*

*vs.*

WARNER BROS. PICTURES, INC., a corporation,

*Respondent.*

## Brief of Respondent in Opposition to Petition for Writ of Certiorari.

The petitioner asks review of an affirmance by the Court of Appeals (Ninth Circuit) of a judgment in favor of respondent rendered by the United States District Court in a diversity case for breach of contract. Incidental to the action is a denial in both courts below of a claim for attorneys' fees and costs under Rules 36 and 37(c) of the Rules of Civil Procedure, the claim being based upon an assertion of partial falsity in a reply of respondent to a request for an admission made prior to the trial. The basic issues were and are primarily factual and such facts were decided and found by the trial court upon adequate and proper evidence, and were reviewed and affirmed as facts by the Court of Appeals.

## Questions Presented.

(1) Does the evidence support the findings that the alleged offer had been withdrawn as to petitioner and that in any event he had not accepted any such offer in compliance with its terms?

(2) Assuming the existence of a justiciable contract, does the evidence support the finding that petitioner had not performed the conditions of such contract?

(3) Is Rule 37(c) of the Rules of Civil Procedure here applicable, and if so, was it error to deny an allowance of costs and attorneys' fees, in view of all the circumstances?

## Statement of the Case.

The facts involve occurrences during the production of a motion picture and its subsequent promotion. The motion picture is in evidence [Pltf. Ex. 2, R. 85] and was viewed by both courts below. It depicts in a medieval Italian setting the conflicts of a local Robin Hood with his feudal lord. The main character is portrayed by Burt Lancaster, a well-known actor. The action shown is strenuous and full of fights, chases and rescues, during which the hero performs a large number of acrobatic feats.

The trial court found [F. II, R. 40-43] that a newsreel sequence containing dialogue mentioning a million dollars as a reward [Pltf. Ex. 6, R. 313-314; Pet. p. 7] had been exhibited and that no other offer or purported offer had been made or authorized by respondent. The newsreel itself is in evidence [Pltf. Ex. 1, R. 77] and was viewed by both courts. The language in the newsreel is set forth

in the Findings and included the following [R. 42-43; also Pltf. Ex. 6, R. 313]:

> "In Hollywood Burt Lancaster counts the $1,000,000 reward offered by Warner Bros. to anyone who can prove that Burt himself did not perform his daring stunts in The Flame and the Arrow."

No proof was attempted by petitioner until the trial and there he attempted to prove that three specific episodes were stunts and had not been performed by Lancaster but by a double. These episodes referred to in the Opinion of the Court of Appeals and throughout the record involve (1) an escape over a roof; (2) a courtyard rescue; and (3) a duel. The trial court found [F. X, R. 45] that Lancaster had actually performed all his daring stunts shown in the picture. As to the three specific episodes, the finding identifies and describes all of them. It finds that none of them was a stunt or daring or dangerous and also finds that Lancaster had personally performed all of the third episode but that in the other two a double had appeared for him.

Petitioner, though particularly attacking this finding as unsupported by the evidence, sets forth certain evidence (Pet. pp. 14-18), which supports the finding of the trial court that a double had appeared in two of such episodes. He omits entirely any of the evidence showing the character of the episodes and bearing upon the remainder of the finding determining that such episodes were not stunts, daring or otherwise. Both courts below reviewed the films, as well as the testimony, and concluded they were not stunts. Such evidence, which will be indicated in greater detail during the Argument, shows that none of such episodes in which a double was used, involved any

special, unusual or striking skill or any acrobatic feat whatever, or any risk, danger, or daring.

Petitioner, after seeing the newsreel, had telephoned one of the attorneys for respondent and stated he felt sure or thought or believed Lancaster had not done all of the stunts in the picture. Petitioner was told at that time that it was respondent's position that no offer had been made but that if petitioner thought there had been, it was then and there withdrawn. The court found [F. IX, R. 45] and concluded [Con. II, R. 46] that the alleged offer had been expressly withdrawn before the petitioner attempted to accept the same. There was personal and actual notice of revocation as to petitioner. Petitioner in fact indicated that what he wanted was a ticket to New York, a suit of clothes and some change [R. 189, 190, 196]. These circumstances are noted in the Opinion of the Court of Appeals.

**Summary of Argument in Opposition to Issuance of Writ.**

(1) There is no question presented herein of the character indicated in Rule 19 of this Court nor any question or circumstance tending to impel the exercise of jurisdiction by this Court.

(a) There is no conflict with *Shuey v. United States,* 92 U. S. 73, 23 L. Ed. 697, in any respect. The notice of revocation here was actual and personal and the cited case establishing that constructive notice of revocation of a published offer may be given by similar publication does not hold that such method is exclusive.

(b) This is a diversity case for breach of contract as to which the law of California is controlling (*Erie R. Co. v. Tompkins,* 304 U. S. 64, 82 L. Ed. 1188), and the

policy of California is to prefer actual notice, accepting constructive notice as a substitute only when required by necessity or extreme expediency. No statute or decision in California restricts revocation of a published offer to the constructive notice provided by similar publication.

(2) If the text of the newsreel constituted an offer, it was revoked as to petitioner before acceptance was attempted by him, and if a justiciable contract existed, petitioner did not perform the conditions thereof. He made no attempt to present proof until the trial and at that time the evidence clearly supports the finding that Lancaster had done personally all the stunts he is shown doing in the picture, and as to the three questioned episodes, that Lancaster had performed one of them but that none of the three was in any case a stunt.

(3) The difference between the asserted offer, and the proof presented, is not, as petitioner argues, a mere technical "variance" under outmoded rules of procedure, but is substantive in determining what was a stunt.

(4) There was no error in refusing petitioner any allowance of costs and attorneys' fees under Rule 37(c) of the Rules of Civil Procedure for an asserted violation of Rule 36. There was no violation of Rule 36, in fact, unless petitioner may interpolate into his demand for an admission under that Rule his own interpretation of the words therein used. If Rule 37(c) is here applicable, the allowance of costs and fees was discretionary with the court and here, even if the answer to the demand for admission were partially incorrect, there were ample reasons for denial.

## ARGUMENT.

### I.

### The Findings of the Trial Court That Lancaster Had Performed All His Daring Stunts Shown in the Picture and That the Three Separate Episodes on Which Petitioner Rests Were Not Stunts, Are Fully Supported by the Evidence.

Though the question as to whether there was a contract would logically receive consideration first in point of time, it is clear that if, in fact, the condition of the asserted contract was not performed, then the technical existence of the contract is of little concern, as was indicated by the trial court [R. 274]. If such contract be assumed at this point, it was certainly conditioned upon proof being presented that Lancaster had not done his daring stunts shown in the picture. Out of the many dangerous, daring and acrobatic feats appearing in the picture as involving Lancaster, petitioner was unable to do more than question three episodes, which the court found not to be of such character. The court found that a double had been used in two of the questioned episodes but that Lancaster had performed the third, though none of the three was a stunt. Petitioner claims essentially that these findings are not supported by the evidence.

The questions and the evidence here are plain and clear and do not in any way involve fine "technical" points (Pet. p. 2) or "hypertechnical" discrimination (Pet. p. 33). It may be noted at this point that petitioner in many places urges that "trick photography" was used to deceive the public and, inferentially, the petitioner. The Court of Appeals also uses the words "trick photography" (Op., Pet., App. A, p. 3), but the term was not

used by that court in the sense that petitioner by continuous innuendo now attempts to convey and this clearly appears from the record. The term is in no way used by the trial court in the findings. Trial counsel for petitioner several times stated there was no "trick photography" in these episodes, nor is there any evidence that petitioner was so deceived. Petitioner himself had been employed in this very picture and had been a motion picture actor [R. 147].

The three questioned sequences must be considered somewhat in detail. Finding X [R. 45-46] describes the episodes and finds as already indicated. The evidence hereafter set forth contains the testimony of witnesses, and in each case is in addition to the visual evidence of the motion picture itself, which cannot be put in words, but was seen by both courts below, and is noted by the Court of Appeals (Op., Pet., App. A, p. 4).

**(a) First Episode.**

(1) The finding:

> "The Court finds that the sequence in said picture which showed the character Dardo carrying the character Rudi for about twenty-five feet along the crest of a roof, in the distance and silhouetted against the sky, was actually performed, not by Burt Lancaster, but by one Don Turner, who doubled for Lancaster and who carried a midget. The Court finds that the action so portrayed was not a stunt and was not daring or dangerous." [R. 45.]

(2) The evidence:

In this sequence, as exhibited in the picture, the figure representing Dardo was not Lancaster but Don Turner. Lancaster had done the precise thing in rehearsal [R.

235-236, 259-260], but in the film actually exhibited, the shot had been made with Turner. The particular sequence occupied only enough time for the figure to move about 25 feet. The particular shot was only a small part of the episode. In the whole sequence, the action shows the rescue by Dardo of a boy from among a crowd in a courtyard. Dardo and the boy are thrown bodily over the heads of the crowd [R. 202-203]. Dardo, carrying the boy on his shoulder, next runs up a temporary scaffold along the front of the building and then up the slanting roof. All of this part of the action, which was difficult, dangerous and required striking and unusual skill and acrobatic ability, was without question performed by Lancaster [R. 174, 202-203, 234]. At the peak of the roof, there was a substitution and the figure, though still apparently the character Dardo, carrying the boy, continued along the crest or ridge. It was in that small portion that the figure representing Dardo was Turner and not Lancaster.

The roof was part of a motion picture set. A sketch showing a cross-section of the structure is in evidence [R. 390] and its nature was fully described by witnesses [R. 175, 220, 248-249]. As in other motion picture sets, the building is merely a front. The part showing in the picture and facing the camera was a building with a steep gable running to a crest 24 feet from the ground. To either the eye or any camera, the building from the front would appear to be normal and with a normal pitched roof, but this optical fact is hardly trick photography. The feats done by Lancaster were all in plain sight on the real and normal side of the building. Along the crest or the apparent peak of the roof but on the side away from the camera, there was substantial scaffolding, including

a runway or path two feet in width and made of heavy timbers. Slightly below the runway itself was another platform or runway an additional three feet in width complete with a 3′-6″ railing or guard. The runways were primarily for the use of electricians or other technicians and were not specially built [R. 248-249, 251]. The runways, the scaffolding and the guard rail being level with the apparent peak or slightly below, would not, of course, show from the front or in the picture. It was along this pathway that the figure was carried about 25 feet by Turner, though Lancaster had already done it once, as noted. The figure at that point was not actually a boy but was a midget and he, as the one carried, testified that he was carried along a platform safe enough for an elephant to walk upon [R. 238].

There is no conflicting evidence on this matter, and even counsel for the petitioner indicated no "trick photography" was involved [R. 207]. Taking the episode as a whole, Lancaster did the difficult and dangerous portion and when it became merely work, his place was taken by Turner. The trial court, fully aware of the circumstances, said that the part Turner did was no more of a stunt than walking into the courtroom [R. 208], and formally found it was not a stunt [R. 45].

**(b) Second Episode.**

(1) The finding:

> "That in the sequence which shows the character Dardo riding into the courtyard on a horse which he brings to a stop, and in which he steps from the horse to the bed of a stationary two-wheeled cart, cuts the rope by which the character Pietro was suspended, and then drives the horse pulling the cart

from the courtyard, was performed by Don Turner, who doubled in said sequence for Burt Lancaster, but that the action of said sequence did not constitute a stunt, nor was it daring or dangerous." [R. 45-46.]

(2) The evidence:

The episode was completely described by witnesses, whose testimony is in the record. Turner himself (and petitioner nowhere mentions or sets forth any such evidence) said the [R. 171] during the melee in the courtyard, he in the character of Dardo was standing on the sidelines, and when his time came to rescue Pietro, he rode into the scene, brought his own horse practically to a stop, stepped on to the low bed of the cart, cut down the figure being hanged, and drove off. He testified that the cart at the time was stationary and, in fact, that someone was holding the head of the horse that was attached to the cart [see also R. 209-210 and 223-224]. This testimony also shows that it was Lancaster and not Turner in the actual melee. Turner took part in various scenes when he was not doubling for Lancaster but was merely a general character and Turner may have been in the melee as well but not as Dardo or as a double for Lancaster [R. 223-225], and most of the time Turner was on the sidelines [R. 171].

**(c) Third Episode.**

(1) The finding:

"* * * the Court finds specifically that he [Lancaster] did do the entire sequence of the duel in which the character Dardo is shown fighting the character Alesandro, and that the only portions of said sequence which appeared on the screen in which the character Dardo is portrayed by a double, are

two shots showing a portion of the shoulder and arm of Don Turner doubling for Lancaster. The Court also finds that said duel sequence was not a stunt and was not daring or dangerous." [R. 46.]

(2) The evidence:

Lancaster, in fact, did the whole sequence [R. 215-216, 229]. The sequence had also been done many other times [R. 179], and in the photoplay as released, the two shots mentioned by the court were interpolated from one of the other recordings. Trial counsel twice stated that there was no "trick photography" in this duel [R. 287, 294, 295].

The scene was designed and laid out by one Cavens, a fencing instructor, who referred to himself as a "motion picture choreographer of fencing" [R. 229]. The steps, the movements, the blows, the parries, the advances and retreats, were all laid out, memorized and practiced in advance in the same way that the choreography of a ballet is established. Each actor knows exactly what the other is going to do, how he is going to do it, and when it is to be done [R. 176-178]. The character Dardo was Lancaster and not Turner and Lancaster actually did and was photographed doing the whole sequence [R. 215-216]. Parts of the sequence were, as indicated, done several times and in one of these the camera was so placed to give a full close-up view of the opponent of Dardo, that is to say, Alesandro, and in this particular recording, very short in extent, Turner, being also familiar with the steps and movements, was used in place of Lancaster to save money and time, since the arm and shoulder of Turner alone was picked up by the camera and he was serving almost as a piece of scenery. Similarly, when

a shot was made showing a close-up of Lancaster in one of the other recordings, to show his close-up facial expressions and the like, the opposing sword was held by Cavens. There is not the slightest evidence that these substitutions in these trivial shots were made because of any risk or particular skill needed for that part of the episode. It had already been done once by the actual actors and photographed as a whole.

**(d) What Is a Stunt?**

Petitioner alleged in his Complaint, as noted by the Court of Appeals, that the offer was of a reward to anyone who could prove that Lancaster "did not do or perform all of the stunts he was shown doing *or purported to perform*" in the motion picture [emphasis supplied; see Complaint, Par. VI, R. 5]. Since the language of the newsreel or of the newspaper, for that matter, used no such language, petitioner now urges that the mention of the difference by the Court of Appeals (Pet., App. A, pp-2-3) between the language of the Complaint and the actual proof is a technical application of the old rule against variance under principles now abolished under the Federal Rules of Civil Procedure (Pet. pp. 31-33). Actually, the question has nothing to do with such possible technical variance but is substantive, in that petitioner argued in the Court of Appeals and now urges that the picture itself defined what would be considered a stunt within the meaning of the newsreel and hence would include all apparent action, irrespective of what actually took place. Both courts viewed the films, and had before them the evidence supplied by those pictures.

Petitioner gives the definition of a stunt in Webster (Pet. p. 47) and such definition describes a stunt as "a

feat or performance * * * striking for the skill, strength, or the like, required * * * any unusual feat or performance * * *." The newsreel was qualified to require that the incident be a "daring stunt." Petitioner, however, insists that the motion picture itself indicated what was daring or dangerous and a stunt (Pet. pp. 47, 53). If so, both courts viewed the picture, and decided the fact. He also claims that the fact that an employee classified as a stunt man did double for Lancaster automatically showed that the episode was a stunt (Pet. p. 53).

The newsreel, in addition to specifying daring stunts [R. 313], did give two samples, consisting of somersaults from six horizontal bars high in the air and walking across a pole 35 feet in the air. The newspaper item also confines itself to the somersaults and the walking of the pole and the additional item of scaling walls. Petitioner disregards these samples in the newsreel or paper as constituting the definition of a stunt and seems to refer only to the actual motion picture. In the former, the samples given are not the episodes here involved in any way nor do they resemble them in action, risk or the requirement for skill or strength. It seems that petitioner disregards these specific matters which might inferentially be called stunts, in view of the language of the newsreel and paper, since beyond question, Lancaster did those things and all other things like them. If petitioner actually means that everything which appeared in the main picture was to be the guide, then every portrayal of the loss of a life therein would be the supreme stunt. Nevertheless, whether it be on the stage or in a motion picture, it must be taken as common knowledge that the actors do not really kill each other even though the villian

appears to have been stabbed through the heart. The fact that an actor appears to have received a mortal wound does not make his work necessarily hazardous or involve special skill or strength or in fact call for anything other than the exercise of normal dramatic art. This fact is recognized by the Court of Appeals (Op., Pet., App. A, pp. 4-5).

Nor is the fact that an employee in the technical classification of a stunt man does a bit of work make that work a stunt. In the courtyard scene (Episode 2), it was a stunt man who held the head of the cart horse to prevent any movement [R. 171], and it is difficult to believe that even petitioner would attempt to classify the holding of a quiet, stationary cart horse by the bridle to be a stunt.

The fact that there was no actual danger in any of the three episodes here is very apparent, as is the contrast to what Lancaster himself did. None of the portions of the action in which in any of these episodes Turner doubled for Lancaster involves any daring whatsoever, nor any striking skill or strength or constitutes any unusual feat or performance, as Webster put it. It is also clear that whatever was required of the character Dardo which needed striking skill or strength or constituted an unusual feat was actually done by Lancaster. He was capable of doing it, had done it for a living in the past and actually did it.

In the duel scene (Episode 3), if participation in a rehearsed and completely laid out choreographical duel could in any way be said to require striking skill or be unusual, then it is equally clear that Lancaster did the whole sequence. However, from the evidence, the duel no more

involved a stunt than the performance of the chorus in a formal ballet.

The three portions of Finding X which petitioner attacks, obviously do two things. They find whether Lancaster did or did not do the particular episodes and that such episodes were not stunts. Petitioner has confined himself to presenting and discussing evidence showing whether or not Lancaster did the episodes. Since the court found that in the first two such episodes Lancaster did not do it, such evidence merely supports the finding. Petitioner does not set forth or advert to the very clear evidence herein set forth and which, with the picture itself, bears upon the remaining portion of the findings, determining in each case that the episode was not a stunt.

## II.

## There Was No Justiciable Contract Here.

### (a) No Possible Conflict With Shuey v. United States, and Revocation by Personal Notice Is Effective.

The trial court here found that there was no contract. It found [Findings II and III, R. 40-43] as a fact that there was no offer or purported offer other than that which might have been contained in the newsreel; that petitioner did not accept any such offer [F. III, R. 43], and that the alleged offer was expressly withdrawn before petitioner attempted to accept the same [F. IX, R. 45]. Each of such findings was fully supported by the evidence. The language of the newsreel has been discussed. It was restricted to "daring stunts." The telephonic conversations between petitioner and Mr. Gordon Files have been noted and are commented upon by the Court of Appeals as failing to constitute any acceptance. Clearly, petitioner was given actual and personal notice

of revocation. Petitioner urges that an offer made through the medium of a newsreel can be revoked only by an appropriate announcement also presented by the same means, that such method of revocation is the *exclusive* method available, that personal notice to an individual is entirely unavailing, and that any holding to the contrary is in conflict with *Shuey v. United States,* 92 U. S. 73, 23 L. Ed. 697.

In *Shuey v. United States,* decided by this Court in 1876, there had been a revocation of an offer of reward by similar publication as was given to the original offer, and this Court held it to be effective. The idea that this holding established an exclusive method of revocation of a general offer appears to have stemmed from a casual and very early comment of Sir William Anson, in which, citing the *Shuey* case, he indicated that in America revocation of a general offer can be revoked only in the way in which it is made. This comment appeared throughout many editions of Anson on Contracts and is found as Footnote A, page 45, of the 11th English Edition, published as the 2nd American Edition, in 1907. It was repeated in the 3rd American Edition at page 55. The comment has not been accepted by later American writers and the whole rule is well stated by Professor William Page in his Law of Contracts, 2nd Edition, Section 135, page 205, as follows:

> "If an offer has been made to the general public, as by advertisement, such offer may be revoked by a similar advertisement, * * * or by other equally public means; as well as by actually communicating notice of such revocation to some specific person in order to revoke such offer as to him."

Professor Williston (Williston on Contracts, Rev. Ed., 1936, Sec. 59, p. 164, Vol. 1) puts it that

> "* * * such an offer is irrevocable as to any person who is not actually notified of the revocation * * *"

unless there is a reasonable effort to bring notice home to the public by similar publication.

In the present case, there was actual notice and even under the general rule, there is nothing conflicting with *Shuey v. United States* in any respect. Even if there were, the present case is a diversity case for breach of contract as to which the law of California is controlling (*Erie R. Co. v. Tompkins,* 304 U. S. 64, 82 L. Ed. 1188), and while there appears to be no California decision which describes the manner in which a general offer may be revoked, the State statutes appear clearly to be consonant with the general rule as stated by Professor Page. Section 43 of the Restatement of the Law of Contracts, noted by petitioner (Pet. p. 44), merely reflects the permissive language of the *Shuey* case.

Section 1587 of the California Civil Code states:

> "A proposal is revoked: (1) by the communication of notice of revocation by the proposer to the other party, in the manner prescribed by Sections 1581 and 1583 before the acceptance has been communicated to the former."

Section 1581 referred to provides that:

> "Consent can be communicated with effect, only by some act or omission of the party contracting, by which he intends to communicate it, or which necessarily tends to such communication."

Section 1583 merely provides that a communication is effective when put in course of transmission. Section 18 of the California Civil Code states that notice can be either actual or constructive.

From these statutes, it is clear that notice of a revocation must be communicated and that such communication can be either actual or constructive in character. In the *Shuey* case, the communication was constructive only. In the present case, the communication was direct and personal. The question, of course, is not of general revocation but revocation as to the petitioner.

The Supreme Court of California in *Stockton Automobile Co. v. Confer,* 154 Cal. 402, at 408, 97 Pac. 881, a case not comparable factually, nevertheless expresses the policy of the State as being that:

> "* * * the law always favors a personal notice, and countenances substituted and constructive notices as matters of necessity or extreme expediency."

Certainly, the decision in the present case cannot be said to be in conflict with *Shuey v. United States,* and the personal and actual notice here present is fully within the statutory law of the State, as above set forth.

**(b) There Was No Acceptance of Any Offer.**

The trial court found [F. III, R. 43] that the plaintiff did not accept any offer, and did not gather or seek evidence or prove or submit proof of the facts which were the condition of the offer or even attempt to do so until after the alleged offer had been withdrawn [F. IV, R. 44; F. IX, R. 45; Con. II, R. 46]. The evidence on the

point is noted in the Opinion of the Court of Appeals (Pet., App. A, p. 2). Mere thoughts or beliefs or feelings are different from proof, and a partial or qualified acceptance or a counter offer is not an acceptance (Op., Pet., App. A, p. 3). To be effective, an acceptance must comply exactly with the requirements of the offer, omitting nothing from the promise or performance requested. (Sec. 59, Restatement of the Law of Contracts; Code Civ. Proc., Sec. 1585; *Wristen v. Bowles,* 82 Cal. 84, 22 Pac. 1136; *Tilley v. City of Chicago and County of Cook,* 103 U. S. 155, 26 L. Ed. 374.)

**(c) The Element of Intent to Contract Is Not Demonstrated.**

Petitioner, intermingled with other arguments, cites *Carlill v. Carbolic Smoke Ball Co.,* 1 Q. B. (C. A.) 256 (Pet. p. 42), and others in which the question was whether there was an intent to contract (Pet. p. 36). Quite aside from the found fact that any offer had been revoked, the nature of the language in the newsreel here and petitioner's vague assertions at the time of his asserted acceptance over the telephone, indicate there could be no justiciable contract.

The newsreel in language and action shows Lancaster purporting to count a reward described as a million dollars, dollar by dollar. He says he has done it three times [R. 313] and, of course, literally speaking, it would take a person in excess of three months, working full time, to so count a million dollars, dollar by dollar. The dialogue twice refers to giving away a million dollars [R. 314], and an offer to make a gift does not result in a contract.

Language, setting and amount are all, we suggest, such as would cast very serious doubts upon any possible belief of petitioner that there was a true intent to contract under or by reason of the newsreel announcement. When the conditions of the newsreel presentation are considered in connection with petitioner's vague and tentative response, then his beliefs and intentions should be seriously questioned.

In addition to intent, there must, of course, be consideration to establish a justiciable contract. Consideration did exist in *Carlill v. Carbolic Smoke Ball Co., supra.* This case was the major subject of discussion in *Briggs v. Miller,* 176 Wis. 321, 186 N. W. 163. It is there pointed out that in the *Carbolic* case, after learning of and in reliance upon the offer or warranty, the plaintiff purchased the device in question and used it as directed but nevertheless the device failed to perform. The Wisconsin court notes that the defendant derived a direct benefit from the sale of the device and that the same was true in other cases of the same class, thereby distinguishing it from the facts in the *Briggs* case. Consideration for an offer for a reward may often be found in an act such as production of proof or giving of information but the mere announcement of acceptance is not consideration.

The Restatement of the Law of Contracts, Section 75, Subdivisions (b) and (c), notes the rule as being that consideration must be actually bargained for and that the fact that one party relies upon a promise, to his injury, does not establish consideration without the element of bargain or agreed exchange. This statement is quoted with approval by the Supreme Court of California in *Bard v. Kent,* 19 Cal. 2d 449, at 452, 122 P. 2d 8.

## III.

## There Was No Error in Refusing Petitioner Any Allowance of Costs or Fees Under Rule 37(c).

The Opinion of the Court of Appeals (Pet., App. A, p. 5) sets forth the general facts and affirms that under the circumstances there was no error in denying petitioner any allowance of fees or costs under Rule 37(c). In addition to the grounds there stated, respondent submits that Rule 37(c) is wholly inapplicable, whether or not it is mandatory, unless there is a violation of Rule 36, and that here such violation does not in fact exist.

Petitioner claimed $25,000 counsel fees, plus costs [R. 61]. In 1951, he had made requests for admissions under Rule 36 [R. 17-20]. The issue concerns the third request [R. 18] where respondent was requested to admit [R. 18] that the person "who ran along the edge of the roof of a church or high building carrying another person" was not Lancaster. To this, the respondent answered "no" [R. 38]. The proof did show, as already described, that Lancaster was the person who did the major and stunt portion of the episode but was not the person who went along the crest or peak of the roof.

If petitioner may now interpolate his own definition of what is the "edge of the roof" to mean only the ridge or crest, then the answer could be considered incorrect. A gable roof has a crest or peak or ridge in the center, two sides and a lower boundary along the eaves. Lancaster had done all of the action along the lower boundary and up the side and since these are the "edges" of the roof, the answer was correct.

Petitioner cites two trial court decisions (Pet. p. 55) supporting his argument that the rule is mandatory in

this case. *Modern Food Process Co. v. Chester Packing & P. Co.*, 30 Fed. Supp. 520, simply describes the process made available by Rules 36 and 37 and includes the remark that the latter rule permits a penalty in the discretion of the court. *Metropolitan Life Ins. Co. v. Everett*, 15 F. R. D. 498, again describes the process and indicates that the time for making a motion thereunder is after the trial. Neither case purports to interpret the rule as petitioner would here have it or otherwise touch any issue now presented.

Respectfully submitted,

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